APPENDIX

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Nos. 11A1, 11A2

IN THE SUPREME COURT OF THE UNITED STATES

HUMBERTO LEAL GARCIA, AKA HUMBERTO LEAL, APPLICANT

v.

STATE OF TEXAS

(CAPITAL CASE)

ON APPLICATIONS FOR A STAY OF EXECUTION

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPLICATIONS FOR A STAY

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The Solicitor General, on behalf of the United States, respectfully files this brief as amicus curiae in support of the applications for a stay of execution. The imminent execution of petitioner would place the United States in irreparable breach of its international-law obligation to afford petitioner review and reconsideration of his claim that his conviction and sentence were prejudiced by Texas authorities' failure to provide consular notification and assistance under the Vienna Convention on Consular Relations. This Court has made clear that Congress has the constitutional authority to provide a federal remedy that would bring the United States into compliance with its international

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legal obligation. Legislation has been introduced in the United States Senate, with the full support of the Executive Branch, to achieve this objective. The Attorney General and the Secretary of State have submitted a joint letter to the Chairman of the Senate Judiciary Committee attesting to the government's strong support for the legislation.

Ensuring that the United States complies with its international obligations regarding consular notification and access serves vital national interests. These interests include protecting Americans abroad, fostering cooperation with foreign nations, and demonstrating respect for the international rule of law. The recently introduced Senate bill that would bring the United States into compliance, however, cannot be enacted before petitioner's scheduled July 7, 2011, execution date. To permit Congress a reasonable period in which to act on the bill, a stay of execution until the adjournment of the current session of Congress (which must occur by January 3, 2012) is therefore warranted. This Court has authority to grant a stay under the All Writs Act, 28 U.S.C. 1651, and doing so would accord with the Court's traditional standards and serve compelling national interests.[1]

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[1] Petitioner has also filed a petition for a writ of certiorari (No. 11-5001) and a petition for an original writ of habeas corpus (No. 11-5002). This brief is not being filed in support of those petitions. Rather, as explained at pp. 22-23, infra, the grant of a stay is appropriate in aid of this Court's future jurisdiction to review the judgment in a proceeding under the Consular Notification Compliance Act of 2011, S. 1194, 112th

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STATEMENT

1. In 1969, the United States ratified the Vienna Convention on Consular Relations (Vienna Convention), done Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. Article 36 of the Convention obligates states to inform a detained foreign national that he may receive the assistance of his country's consulate and to notify the consulate and allow access if the individual so requests. 21 U.S.T. 100-101, 596 U.N.T.S. 292-294.

In 1969, the United States also ratified the Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol), done Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487. See 21 U.S.T. 77, 700 U.N.T.S. 368. The Optional Protocol provides that "[d]isputes arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the International Court of Justice." 21 U.S.T. at 326, 596 U.N.T.S. at 488.[2] In addition, Article 94 of the Charter of the United Nations (U.N. Charter), 59 Stat. 1051, another Treaty ratified by the United States, provides that "[e]ach member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."

Cong. (June 14, 2011), a bill currently pending in the Senate.

[2] In 2005, the United States withdrew from the Optional Protocol. See Letter from Condoleezza Rice, Secretary of State, to Kofi A. Annan, Secretary-General of the United Nations (Mar. 7, 2005), http://www.state.gov/documents/organization/87288.pdf.

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In Case Concerning Avena & Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31) (Avena), the International Court of Justice (ICJ) determined that the United States had violated Article 36 of the Vienna Convention by failing to inform 51 Mexican nationals, including petitioner, of their Vienna Convention rights, and by failing to notify consular authorities of the detention of 49 Mexican nationals, including petitioner. Id. at 71 ¶ 153. The ICJ determined that the appropriate remedy for those violations "consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of [affected] Mexican nationals." Id. at 72 ¶ 153. The court stated that review and reconsideration should occur through a judicial process, id. at 65-66 ¶¶ 140-141, that the relevant inquiry in that process would be whether the treaty violation caused actual prejudice to the defendant, id. at 60 ¶ 121, and that procedural-default rules could not bar that review, id. at 57 ¶ 113.

In 2005, President George W. Bush determined that the United States would discharge its international-law obligations under Avena by "having State courts give effect" to Avena in the cases, including petitioner's, that were addressed in that decision. Medellin v. Texas, 552 U.S. 491, 503 (2008) (Medellin II). In Medellin II, however, this Court held that "neither Avena nor the President's Memorandum constitutes directly enforceable federal law

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that pre-empts state limitations on the filing of successive habeas petitions." Id. at 498-499. The Court recognized that "the ICJ's judgment in Avena creates an international-law obligation on the part of the United States," id. at 522, and it observed that Congress could give that judgment domestic effect "through implementing legislation," id. at 520.

2. Petitioner is a Mexican national who has resided in the United States since he was two years old. In 1995, he was convicted of capital murder in a Texas state court and was sentenced to death for kidnapping, raping, and murdering a 16-year-old girl. The prosecution's evidence at his trial included two incriminating statements he made to the police during non-custodial interviews on the day of the murder. See Leal v. Dretke, Civ. No. SA-99-CA-1301-RF, 2004 WL 2603736, at *2-*7 (W.D. Tex. Oct. 20, 2004), certificate of appealability denied, 428 F.3d 543 (5th Cir. 2005), cert. denied, 547 U.S. 1073 (2006).

While his direct appeal was pending, petitioner notified the Mexican government of his conviction and sentence. He did not, however, raise any claim related to the violation of the Vienna Convention. See Leal v. Quarterman, Civ. No. SA-07-CA-214-RF, 2007 WL 4521519, at *3 (W.D. Tex. Dec. 17, 2007), aff'd in part and vacated in part, 573 F.3d 214 (5th Cir. 2009). The Texas Court of Criminal Appeals affirmed his conviction, Leal v. State, No. 72,210

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(Feb. 4, 1998) (en banc), and this Court denied certiorari, 525 U.S. 1148 (1999).

3. Petitioner sought habeas corpus relief in state court, claiming, among other things, that Texas's failure to afford him consular notification and access required suppression of the incriminating statements he made to the police. The Texas trial court rejected that claim on the merits, finding that because petitioner was not in custody at the time he was interviewed by the police, Vienna Convention obligations were not triggered and, accordingly, his statements were not obtained in contravention of the Vienna Convention. Ex parte Leal, No. 94-CR-4696-WI, slip op., at 68 (Tex. 186th Dist. Ct. Apr. 23, 1999). The Texas Court of Criminal Appeals likewise denied relief based on the trial court's findings and its own review. Ex parte Leal, No. WR-41,743-01 (Tex. Crim. App. Oct. 20, 1999).

Petitioner then sought federal habeas corpus relief. His petition was based on ineffective assistance of trial counsel; he did not assert any claims based on the Vienna Convention. See Leal v. Dretke, 2004 WL 2603736, at *1. The district court denied relief, see id. at *10-*20, and the court of appeals denied a certificate of appealability, 428 F.3d 543 (5th Cir. 2005), cert. denied, 547 U.S. 1073 (2006).

4. Following the ICJ's decision in Avena, petitioner filed a second petition for state habeas corpus relief, arguing that

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Avena -- and President Bush's Memorandum directing its implementation -- obligated the state courts to provide judicial review and reconsideration of his defaulted Vienna Convention claim. The Texas Court of Criminal Appeals summarily denied the petition, Ex parte Leal, No. WR-41,743-02, 2007 WL 678628 (Mar. 7, 2007), and, after the decision in Medellin II, this Court denied certiorari, 552 U.S. 1295 (2008).

Thereafter, petitioner filed a second federal habeas corpus petition, again relying on Avena and the President's determination to implement it through review and reconsideration in the state courts. The district court dismissed the petition as second or successive. Leal v. Quarterman, 2007 WL 4521519, at *4-*5; see 28 U.S.C. 2244(b)(3). Despite determining that it was required "to dismiss [the petition] without prejudice for lack of jurisdiction," id. at *5, however, the court went on to find "no arguable merit" to petitioner's claim that he had sustained "actual prejudice" within the meaning of Avena as a result of the Vienna Convention violation, id. at *7. Conducting what it described as the judicial review and reconsideration required by Avena, the court stated that there was "little the Mexican government could have done to aid petitioner's trial counsel." Id. at *17.

The court of appeals affirmed in part and vacated in part. Leal Garcia v. Quarterman, 573 F.3d 214 (5th Cir. 2009). The court held that the petition was not "second or successive" under Section

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2244 because it was based on the President's Memorandum implementing Avena, which was not available while the first federal habeas petition was pending. Id. at 223-224. The court of appeals nevertheless dismissed the petition with prejudice based on this Court's intervening decision in Medellin II, although it observed that petitioner could file another petition in the event that Congress passed legislation requiring state compliance with Avena. Id. at 224 & n.54. Finally, the court of appeals vacated the district court's analysis of whether petitioner had been prejudiced by the Vienna Convention violation, explaining that "the district court's determination [was] based on its erroneous assumption of hypothetical jurisdiction." Id. at 216 n.4, 224-225.

5. On June 14, 2011, after extensive consultation with the Department of State and the Department of Justice, Senator Leahy introduced the Consular Notification Compliance Act of 2011 (CNCA), S. 1194, 112th Cong. (App., infra, 1a-9a), in the United States Senate. The bill provides that, "[n]othwithstanding any other provision of law, a Federal court shall have jurisdiction to review the merits of a petition claiming a violation of Article 36(1)(b) or (c) of the Vienna Convention * * * , filed by an individual convicted and sentenced to death by any Federal or State court." CNCA § 4(a)(1). It also requires the district court to grant a stay of execution if necessary to consider such a petition, CNCA § 4(a)(2), and it provides that no petition filed within a year of

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the enactment of the bill "shall be considered a second or successive habeas corpus application or subjected to any bars to relief based on pre-enactment proceedings," CNCA § 4(a)(5). To obtain relief, the petitioner must make a showing of "actual prejudice to [his] criminal conviction or sentence as a result of the violation." CNCA § 4(a)(3). The Secretary of State and the Attorney General have jointly written to Senator Leahy to express the Executive Branch's strong support for the CNCA. See Letter from Hillary Rodham Clinton, Secretary of State, and Eric H. Holder, Jr., Attorney General, to Senator Patrick J. Leahy (Jun. 28, 2011) (State/Justice Letter) (App., infra, 10a-12a).

6. Petitioner is scheduled to be executed on July 7, 2011. On June 16, he filed a motion under Federal Rule of Civil Procedure 60(b) to reopen the judgment dismissing his federal habeas petition; he also sought a stay of execution. Leal Garcia v. Thaler, Civ. No. SA-07-CA-214-OG, 2011 WL 2479868 (W.D. Tex. June 21, 2011). He argued that the reopening and stay were justified based on the introduction of the CNCA in the Senate. The district court dismissed the Rule 60(b) motion, treating it as a successive habeas corpus petition because the court of appeals had previously denied petitioner's Vienna Convention claim on the basis of Medellin II. Id. at *6-*7. The court also denied a stay, noting that "[t]he filing of proposed legislation which might one day afford petitioner a remedy in the state or federal courts does not,

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standing alone, justify a stay of execution." Id. at *8. The court observed that, in Medellin v. Texas, 554 U.S. 759 (2008) (per curiam) (Medellin III), this Court had denied a stay of execution based on such a claim, in the absence of any representation by the Executive Branch that there was a likelihood of action on the proposed legislation. 2011 WL 2479868 at *8. The district court concluded that petitioner's bare assertions about the likelihood of the legislation's enactment were too speculative to warrant the issuance of a stay in the absence of any "genuine progress" toward "actual passage" of the legislation. Id. at *8-*9.

In addition, on June 16, petitioner filed a third federal habeas corpus petition and motion for a stay of execution, relying on the introduction of the CNCA in the Senate. Leal Garcia v. Thaler, Civ. No. SA-11-CA-82-OG, 2011 WL 2479912 (W.D. Tex. June 22, 2011). The district court dismissed the petition, without prejudice, as "plainly without arguable merit" under Rule 4 of the Rules Governing Section 2254 Cases, on the ground that "the filing of a legislative proposal in the form of a bill is of no legal consequence" and provides "no arguable legal basis for federal habeas corpus relief." Id. at *16. The district court also denied petitioner's stay motion for the reasons that it had denied petitioner's stay request in connection with his Rule 60(b) motion, id. at *17-*19, and denied a certificate of appealability, id. at *21.

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The court of appeals also denied a certificate of appealability and petitioner's request for a stay of execution. Leal Garcia v. Thaler, No. 11-70022, slip op. (5th Cir. June 30, 2011) (per curiam). The court concluded that reasonable jurists would not disagree with the district court's conclusion that petitioner does not have "a due process right to remain alive until the proposed Avena legislation becomes law." Id. at 6. It further determined that the "pure speculation of future legislation that could aid [petitioner] in some way does not give rise to a substantial claim upon which [a stay of execution] may be granted." Id. at 9.

7. On June 23, petitioner sought state habeas corpus relief and a stay of execution in light of the pendency of the CNCA. On June 27, the Texas Court of Criminal Appeals denied the petition and denied a stay. Ex parte Leal, No. WR-41,743-03. Justice Price concurred, joined by Justices Johnson and Alcala, observing that petitioner "finds himself in possession of an apparent right under international law" but without a judicial remedy under Texas law. Ibid.

ARGUMENT

This case implicates United States foreign-policy interests of the highest order. Indeed, this Court has recognized those interests to be "plainly compelling." Medellin II, 552 U.S. at 524. Petitioner's execution would cause irreparable harm to those

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interests by placing the United States in irremediable breach of its international-law obligation, imposed by the ICJ's judgment in Avena, to provide judicial review of petitioner's Vienna Convention claim. That breach would have serious repercussions for United States foreign relations, law-enforcement and other cooperation with Mexico, and the ability of American citizens traveling abroad to have the benefits of consular assistance in the event of detention.

Efforts on the part of Congress and the Executive Branch to satisfy the United States' obligation under Avena have resulted in the recent introduction in the Senate of the Consular Notification Compliance Act (CNCA). The CNCA would provide petitioner the procedural remedy that the United States is obligated to provide under international law: review and reconsideration of his Vienna Convention claim. The CNCA is currently under active consideration in Congress; the Chairman of the Senate Judiciary Committee has announced his intent to hold a hearing on the bill in July. App., infra, 16a. The Executive Branch participated in the development of the legislation and the Secretary of State and the Attorney General have publicly expressed their strong support for its enactment. See State/Justice Letter, App., infra, 10a-12a. That support distinguishes this case from Medellin III, in which this Court held that the possibility of enactment of a previous bill was "too remote" to warrant the issuance of a stay, in the absence of

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any statement from the Executive Branch about the likelihood of Congressional action. 554 U.S. at 759-760; see id. at 760 ("The Department of Justice of the United States is well aware of these proceedings and has not chosen to seek our intervention."). While enactment of the Senate bill cannot be assured, in developing and advancing this legislation, the political branches, acting in coordination, have made greater efforts to achieve compliance with Avena than at any previous time.[3]

Given these circumstances -- petitioner's imminent execution date, the breach of United States' legal obligations that will ensue, the significant and detrimental foreign-policy consequences that will follow from such a breach, and the pendency of legislation that would avert those harms -- the Court should stay petitioner's execution until the adjournment of the current session of Congress (which must occur no later than January 3, 2012) in order to allow the United States additional time to meet its international-law obligations. The exercise of this Court's discretion to grant such a stay is consistent with the equitable

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[3] Senator Leahy introduced an amendment to address Avena in the FY 2011 Department of State, Foreign Operations, and Related Programs Appropriations Act, S. 3676, § 7082 (July 29, 2010). That amendment, however, did not have the full support of the Executive Branch, and it failed to move forward when negotiations over the budget reached impasse in the fall of 2010. That earlier effort provides no basis for assessing the prospects of the CNCA, which was carefully crafted through extensive executive-congressional discussions, is slated for a hearing, and enjoys high-level executive support.

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principles that have guided this Court's decisions with respect to stays of execution.

Ordinarily, for the Court to grant a stay in a capital case, "there must be a reasonable probability that four Members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed." Barefoot v. Estelle, 463 U.S. 880, 895 (1983) (citation and internal quotation marks omitted). In this case, those factors must be tailored to the basis for the requested stay, i.e., the introduction of legislation in Congress would, if enacted, afford petitioner the review and reconsideration that the United States has an undisputed international-law obligation to provide. The application of the traditional stay factors in this context must consider whether petitioner would have a right to federal-court review and a stay of execution under the legislation that has been introduced; whether petitioner -- and vital national interests -- would be irreparably harmed by denial of a stay; whether the grant of the stay would cause significant harm to the State of Texas; and what impact the grant or denial of a stay would have on the public interest. See Nken v. Holder, 129 S. Ct. 1749, 1756 (2009). Those stay factors are addressed to this Court's discretion. Id. at

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1760-1761. Here, consideration of those factors justifies the exercise of the Court's discretion to grant a stay.

1. Congress's enactment of the CNCA would provide petitioner with the procedural right to federal-court review of his Vienna Convention claim. The United States has consistently acknowledged that it has a treaty-based obligation to provide that procedural right under Avena. See Gov't Br. at 38, Medellin v. Dretke, 544 U.S. 660 (2005) (No. 04-5928) (Medellin I) ("[T]he United States has an international obligation under Article 94 [of the United Nations Charter] to comply with the Avena decision."); Medellin II, 552 U.S. at 504 ("No one disputes that the Avena decision -- a decision that flows from the treaties through which the United States submitted to ICJ jurisdiction with respect to Vienna Convention disputes -- constitutes an international law obligation on the part of the United States.") (emphasis omitted). Under Avena, the United States is required to provide review and reconsideration of the convictions and sentences of the affected Mexican nationals in the decision, including petitioner, because of the United States' failure to provide required information about consular notification and assistance. Medellin II, 552 U.S. at 502-503. Avena requires such review without regard to any state procedural-default rules. Id. at 503.

In 2005, President Bush acknowledged the international legal obligation created by Avena and determined that the United States

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would discharge that obligation by "having State courts give effect" to Avena in the cases, including petitioner's, that were addressed in that decision. Medellin II, 552 U.S. at 503. That determination reflected the President's considered judgment that the United States' foreign-policy interests in meeting its international obligations and protecting Americans abroad required the United States to comply with the ICJ's decision. In Medellin II, the United States reaffirmed the important interests implicated by its compliance with Avena, including "(1) the importance of securing reciprocal protection of Americans detained abroad; (2) the need to avoid harming relations with foreign governments, including Mexico; and (3) the interest in reinforcing the United States' commitment to the rule of law." U.S. Amicus Br. at 11, Medellin II, supra (No. 06-984). This Court agreed that the government's interests in "ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law * * * are plainly compelling." Medellin II, 552 U.S. at 524. Protecting those compelling interests is a sufficiently important matter to warrant this Court's intervention. See Medellin III, 554 U.S. at 761-762 (Stevens, J., dissenting) (noting that the importance of the interests at stake warranted granting a stay and calling for the views of the Solicitor General); id. at 762 (Souter, J., dissenting) (same); id. at 762-

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763 (Ginsburg, J., dissenting) (same); id. at 763-766 (Breyer, J., dissenting) (same).

2. The pendency of the CNCA in the Senate, with the full support of the Executive Branch, creates a sufficient likelihood of petitioner's receiving judicial review and reconsideration of his Vienna Convention claim to satisfy the first stay consideration, i.e., likelihood of success on the merits. The merits here consist of a procedural opportunity, not a right to a substantive outcome.

a. In Medellin II, this Court observed that "[t]he responsibility" for implementing the United States' international legal obligation to comply with Avena "falls to Congress." 552 U.S. at 525-526. In the immediate aftermath of Medellin II, a bill to implement the decision was introduced in the House of Representatives, see Avena Case Implementation Act of 2008, H.R. 6481, 110th Cong. (2008), but that bill was introduced without Executive Branch participation or consultation, and it was not enacted. Following that effort, the various interested Departments of the Executive Branch, working with Congress, painstakingly negotiated and developed legislation that would implement Avena, while balancing the interests in preserving the efficiency of criminal proceedings and protecting the integrity of lawful criminal convictions. The resulting bill, the CNCA, was introduced by Senator Leahy on June 14, 2011.

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The Executive Branch has strongly endorsed the CNCA in a letter to Senator Leahy signed by the Secretary of State and the Attorney General. See State/Justice Letter, App., infra, 10a-12a. The letter explains that enactment of the CNCA is "essential" to the government's "ability to protect Americans overseas and preserve some of [its] most vital international relationships." Id. at 12a. On June 29, 2011, Senator Leahy reiterated the crucial importance of the CNCA "to ensuring the protection of Americans traveling overseas" and to restoring the Nation's "image as a country that abides by its promises and the rule of law." 157 Cong. Rec. S4215-S4216 (June 29, 2011). Noting that "productive discussions with Republicans and Democrats from both the House and Senate" have begun, Senator Leahy, "[a]s [C]hairman of the Senate Judiciary Committee, * * * announc[ed] that [he] intend[s] to hold a hearing on this critical issue in July." Id. at S4216.

The introduction of the CNCA, with the support of the Executive Branch, represents an important step by the political branches toward fulfilling the United States' international-law obligation to implement the Avena decision. The CNCA provides for judicial review and reconsideration, without regard to procedural-default rules, of the capital convictions and sentences of foreign nationals, such as petitioner, who did not receive timely consular notification. CNCA § 4(a)(1). The CNCA also provides that the district court must enter a stay if necessary to allow that review

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to take place. CNCA § 4(a)(2). If and when enacted, the CNCA would therefore satisfy the United States' international-law obligation to comply with the Avena judgment for petitioner and other covered individuals. And it would give petitioner an enforceable legal right to judicial review of his Vienna Convention claim.

b. The right that petitioner would vindicate under the CNCA is an opportunity for judicial review and reconsideration. Neither Avena nor the CNCA would guarantee petitioner a particular outcome. That is because the international-law obligation is one of process, not result. Avena does not require the United States to grant relief for a consular notification violation; it requires only an opportunity for review and reconsideration through an adequate judicial process. Petitioner contends (11A1 Appl. 10-11) that he is likely to show that the Vienna Convention violation caused him prejudice. See also 11-5002 Pet. 25-32. A tribunal with jurisdiction to address that claim would evaluate petitioner's submission in light of the "overwhelming" evidence "at both phases of [petitioner's] capital murder trial." Leal v. Dretke,, 2004 WL 2603736, at *18. Under the CNCA, the court would conduct an evidentiary hearing, if necessary, before determining whether petitioner had shown "actual prejudice." CNCA § 4(a)(3). At this time, however, petitioner's likelihood of success at such a proceeding is not the relevant issue. A stay should instead turn

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on the likelihood of petitioner's obtaining the procedural opportunity for review.

In Medellin III, the Court stated that a showing of prejudice (there, "that [the defendant's] confession was obtained unlawfully") would have to be "[t]he beginning premise for any stay." 554 U.S. at 760. The Court then noted that such a showing of unlawfulness "is highly unlikely as a matter of domestic or international law." Ibid. But a likelihood that petitioner would actually obtain relief by review and reconsideration should not be required in the present context. A stay is warranted to protect the United States' interest in adhering to the rule of international law in affording petitioner the hearing required by Avena. Execution of petitioner without compliance with Avena would produce a further breach of the United States' international-law obligations and gravely harm the United States' foreign-policy interests. Because the breach of those obligations would result from the United States' failure to provide petitioner review and reconsideration, the stay should turn, not on whether he can show a likelihood of prejudice to his trial or sentence, but on whether a sufficient likelihood exists that additional time would enable petitioner to receive the procedural remedy that Avena requires.

Significantly, petitioner has not yet received the judicial review and reconsideration of his claim that Avena requires. In petitioner's first state habeas proceeding, the court addressed

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petitioner's Vienna Convention claim relating to his non-custodial statements, but it held that the Vienna Convention was not violated and, accordingly, it did not consider the issue of prejudice. Although the district court considering petitioner's second federal habeas petition opined that "there is no arguable merit to petitioner's claim that he sustained 'actual prejudice'" as a result of the Vienna Convention violation in his case, Leal v. Quarterman, Civ. No. SA-07-CA-214-RF, 2007 WL 4521519, at *7, it made that statement only after determining that it lacked jurisdiction, id. at *5, and the Fifth Circuit vacated that portion of its opinion, 573 F.3d 214, 224-225 (2009). A determination by a court that lacked jurisdiction does not satisfy Avena.

Review and reconsideration under the provisions of the CNCA would satisfy Avena. If petitioner receives that review, the United States will have discharged its obligations under Avena, even if petitioner fails to show actual prejudice. Conversely, if petitioner does not receive judicial review and reconsideration of his Vienna Convention claim, the United States will have violated its obligations, whether or not there was a reasonable possibility that petitioner could have shown prejudice. See Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena & Other Mexican Nationals (Mex. v. U.S.), 2008 I.C.J. 311, ¶ 76 (July 16) (noting acknowledgment by the United States that if petitioner were "executed without the

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necessary review and reconsideration required under the Avena Judgment, that would constitute a violation of United States obligations under international law").[4]

c. Because the CNCA has not yet been enacted, no currently pending case under the provisions of that bill exists. Nevertheless, the All Writs Act, 28 U.S.C. 1651, authorizes this Court to enter a stay to preserve its potential future jurisdiction. That statute provides in relevant part that "[t]he Supreme Court [and other federal courts] may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. 1651(a). It is well established that the Court's power under the All Writs Act "extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected." FTC v. Dean Foods Co., 384 U.S. 597, 603 (1966)

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[4] Although the United States has withdrawn from the Optional Protocol and is not subject to the jurisdiction of the ICJ for future alleged violations of the Vienna Convention, it is subject to the jurisdiction of the ICJ for enforcement of the original Avena decision. Accordingly, the execution of petitioner in violation of Avena could result in additional proceedings before the ICJ. Indeed, in June 2008, when Medellin's execution was impending, Mexico again took the United States before the ICJ, which entered provisional measures ordering the United States to take all necessary measures to ensure that Medellin was not executed. Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena & Other Mexican Nationals (Mex. v. U.S.), 2008 I.C.J. 311, ¶¶ 76-80 (July 16). The court ultimately found that execution constituted a second violation. See Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena & Other Mexican Nationals (Mex. v. U.S.), 2009 I.C.J. 3, ¶¶ 41-46, 61(2) (Jan. 19).

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(emphasis added); see Telecommunications Research & Action Ctr. v. FCC, 750 F.2d 70, 76 (D.C. Cir. 1984).

If the CNCA is enacted, petitioner can initiate review of his Vienna Convention claims in a federal district court. CNCA § 4(a)(1). He would then be statutorily entitled to a stay of execution, if necessary, "to allow the court to review [his] petition." CNCA § 4(a)(2) ("the court shall grant a stay of execution"). Should the decision in that proceeding be unfavorable to him, he will be able to appeal by obtaining a certificate of appealability upon a "substantial showing of actual prejudice to [his] criminal conviction or sentence * * * as a result of a violation of Article 36(1) of the Vienna Convention." CNCA § 4(a)(6)(B). And the decision of the court of appeals -- whether based on a consideration of the merits of an appeal or based on the denial of a certificate of appealability -- will be subject to review in this Court under 28 U.S.C. 1254(1). See Hohn v. United States, 524 U.S. 236 (1998). The All Writs Act permits this Court to grant a stay to protect that potential future jurisdiction.

d. Because the CNCA has not yet been enacted, existing domestic law does not afford petitioner a right to review and reconsideration.[5] But in determining whether a stay applicant has

[5] Although the United States has an acknowledged international-law obligation to provide petitioner with judicial review of his Vienna Convention claim, and is supporting pending legislation providing for such review, under Medellin II, petitioner does not presently have a legal right to such review

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shown a significant possibility of success, the Court may take into account the possibility of a change in the law. See, e.g., San Diegans for Mt. Soledad Nat'l War Mem'l v. Paulson, 548 U.S. 1301, 1303 (2006) (Kennedy, J., in chambers) (granting a stay in part because the case could be affected by a city ordinance whose validity was being litigated in state court). Indeed, the Court routinely does so when the possible change would result from a judicial decision in a pending case. See, e.g., California v. Hamilton, 476 U.S. 1301, 1302-1303 (1986) (Rehnquist, J., in chambers) (granting stay because "[o]ur decision in Rose v. Clark may well affect the outcome of the instant case"). So long as an applicant can show a reasonable possibility of a change in the law that will entitle him to relief, the source of the change is not relevant.

Because of the active and unequivocal support of the Executive Branch for the CNCA, this case is significantly different from Medellin III. In that case, Medellin sought to delay his execution so that either Congress or the Texas Legislature might have the opportunity to enact legislation implementing Avena and requiring domestic courts to provide review and reconsideration of his procedurally defaulted Vienna Convention claim. 554 U.S. at 759. This Court held that the possibility of enactment of legislation, which had "not progressed beyond the bare introduction of a bill,"

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that is enforceable in domestic courts. See 552 U.S. at 504-523.

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was "too remote" to warrant issuance of a stay, where "neither the President nor the Governor of the State of Texas has represented to us that there is any likelihood of congressional or state legislative action." Id. at 759-760. Here, by contrast, the heads of the Departments of State and Justice have communicated to Congress the Executive Branch's full support for the legislation, emphasized its critical importance to United States interests, and urged Congress to enact it. The Executive Branch's active participation in the development of this legislation, and support for its enactment, make the possibility of Congressional action more likely, and therefore less "remote," than it was in Medellin III.

This case is therefore more akin to those in which the Court has exercised its discretion to stay its mandate in order to provide Congress with a reasonable opportunity to enact legislation in light of a judicial decision. See, e.g., Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 88 & n.40 (1982) (ordering a "limited stay" in order to "afford Congress an opportunity" to enact legislation that would "reconstitute the bankruptcy courts" in response to the Court's decision); Buckley v. Valeo, 424 U.S. 1, 142-143 (1976) (per curiam) (entering a stay to afford Congress an opportunity to reconstitute the Federal Election Commission). Those authorities suggest that, in circumstances affecting vital government interests, this Court may exercise its

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discretion under the All Writs Act to maintain the status quo for a limited period in order to provide an opportunity for Congress to take necessary action.

3. Petitioner's execution would cause irreparable harm to important foreign-relations interests that this Court has described as "plainly compelling." Medellin II, 552 U.S. at 524. The execution would irremediably violate the United States' international-law obligation to comply with the ICJ's judgment in Avena. It would also violate the United States' specific commitments to the international community that it would work to give effect to that judgment. See Medellin III, 554 U.S. at 762-763 (Ginsburg, J., dissenting) (quoting representation by the United States that it continues to seek to give full effect to the Avena decision); Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena & Other Mexican Nationals (Mex. v. U.S.), 2009 I.C.J. 3, ¶ 61 (Jan. 19) (noting "the continuing binding character of the obligations of the United States of America under paragraph 153 (9) of the Avena Judgment" as well as "the undertakings given by the United States of America in these proceedings"). Those violations would cause irreparable harm to the foreign-policy interests of the United States.

Most immediately, petitioner's execution would result in serious damage to United States relations with Mexico. The United States' failure to comply with Avena has generated increasing

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concern by the Mexican government and thus posed an ever-greater obstacle to United States-Mexican relations. Those relations are enjoying an unprecedented level of cooperation but they are also unusually sensitive, so that a breach resulting from petitioner's execution would be particularly harmful. As explained in a letter to the Secretary of State from the Mexican Ambassador, the United States' "continued non-compliance with the ICJ's decision has already placed great strain on [the] relationship" between the United States and Mexico. Letter from Arturo Sarukhan, Ambassador of Mexico, to Hillary Clinton, Secretary of State (Jun. 14, 2011) (App., infra, 13a). "[A] second execution in violation of the ICJ's judgment would seriously jeopardize the ability of the Government of Mexico to continue working collaboratively with the United States" on important law-enforcement initiatives, "including extraditions, mutual judicial assistance, and our efforts to strengthen our common border." Id. at 14a; see State/Justice Letter, infra, 11a ("Continued non-compliance with Avena has become a significant irritant that jeopardizes other bilateral initiatives" between the United States and Mexico.).

Petitioner's execution would also harm relations between the United States and other countries and regional and multilateral institutions that "have repeatedly and forcefully called upon the United States to fulfill obligations arising from Avena." State/Justice Letter, App., infra, 11a. The European Union has

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sent repeated inquiries to the United States about this issue in general, and petitioner's execution in particular. Other Nations, including the United Kingdom, have sent multiple communications that have raised the issue of Avena compliance at high levels. The European Union, Chile, El Salvador, Honduras, Switzerland, and Uruguay have similarly written the Governor of Texas to urge him to grant petitioner a reprieve to allow time for passage of legislation to implement Avena. See App., infra, 20a-31a. Cf. Crosby v. National Foreign Trade Council, 530 U.S. 363, 386 (2000) (noting that "repeated representations by the Executive Branch supported by formal diplomatic protests and concrete disputes" with foreign powers can be sufficient to establish for purposes of preemption that a state's action interferes with the national government's "diplomatic objectives").

Perhaps most important, petitioner's execution could seriously undermine the ability of the United States Government to protect United States citizens who are detained in foreign countries. As the Attorney General and Secretary of State have explained, "[c]onsular assistance is one of the most important services that the United States provides its citizens abroad." State/Justice Letter, App., infra, 10a. In Fiscal Year 2010, United States consular officials assisted more than 3500 United States citizens who were arrested abroad and conducted more than 9500 prison visits. Consular assistance has proved essential to affording

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needed assistance in several sensitive recent cases involving Americans detained in Egypt, Libya, Syria, Iran, and Pakistan, among other countries. Respecting international rules for consular notification is a matter of paramount importance for Americans detained overseas, as foreign nationals detained in the United States usually have a constitutional right to counsel, whereas United States citizens detained in many foreign countries do not. "The United States is best positioned to demand that foreign governments respect consular rights with respect to U.S. citizens abroad when we comply with these same obligations for foreign nationals in the United States." Ibid. Compliance with those obligations is therefore essential in "ensuring that U.S. citizens detained overseas can receive critical consular assistance." Ibid. By contrast, failure to comply with Avena will weaken the force of the United States' insistence that other countries respect those rules; an internationally high-profile execution while remedial legislation is pending would greatly exacerbate that problem.

Finally, the interests served by affording Congress an opportunity to implement the United States' international-law obligations and to prevent the significant damage to the United States' foreign relations flowing from any further breach of those obligations outweigh the State's interest in the immediate enforcement of its judgment. In balancing the equitable principles that govern the issuance of a stay of execution, the Court has

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recognized the "State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." Hill v. McDonough, 547 U.S. 573, 584 (2006). But in this instance, the State's own conduct put the United States in breach of its international obligations, and the State had, and continues to have, the power to remedy that breach and to avoid a further violation in this case.[6] And the Court has recognized that the United States' interests in demonstrating that it respects the rule of law internationally, protecting its citizens who live or travel abroad, and preserving cooperation with Mexico and other nations are "plainly compelling." Medellin II, 552 U.S. at 524. Because the damage to those interests in the absence of a stay would be permanent and irreparable, as compared to the temporary disruption of the State's enforcement of its judgment that a stay would cause, the balance of equities favors a stay until the adjournment of the current session of Congress.

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[6] The Department of State Legal Adviser has written to the relevant authorities in Texas -- the Governor, the Attorney General, the District Attorney, and the Board of Pardons and Paroles -- to urge those officials to make all available efforts under Texas law to secure a continuation or modification of petitioner's execution date to afford Congress a reasonable time to enact legislation that would prevent a violation of the United States' international legal obligations. App., infra, 32a-43a. If Texas authorities take such action, the United States would promptly notify this Court.

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CONCLUSION

The applications for a stay should be granted.

Respectfully submitted.

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JULY 2011

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II

112TH CONGRESS
1ST SESSION

S. 1194

To facilitate compliance with Article 36 of the Vienna Convention on Consular Relations, done at Vienna April 24, 1963, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JUNE 14, 2011

Mr. LEAHY introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To facilitate compliance with Article 36 of the Vienna Convention on Consular Relations, done at Vienna April 24, 1963, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Consular Notification Compliance Act of 2011".

SEC. 2. PURPOSE AND STATEMENT OF AUTHORITY.

(a) PURPOSE.—The purpose of this Act is to facilitate compliance with Article 36 of the Vienna Convention on Consular Relations, done at Vienna April 24, 1963, and

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any comparable provision of a bilateral international agreement addressing consular notification and access.

(b) STATEMENT OF AUTHORITY.—This Act is enacted pursuant to authority contained in articles I and VI of the Constitution of the United States.

SEC. 3. CONSULAR NOTIFICATION AND ACCESS.

(a) IN GENERAL.—As required under, and consistent with, Article 36 of the Vienna Convention on Consular Relations, done at Vienna April 24, 1963, and any comparable provision of a bilateral international agreement addressing consular notification and access, if an individual who is not a national of the United States is detained or arrested by an officer or employee of the Federal Government or a State or local government, the arresting or detaining officer or employee, or other appropriate officer or employee of the Federal Government or a State or local government, shall notify that individual without delay that the individual may request that the consulate of the foreign state of which the individual is a national be notified of the detention or arrest.

(b) NOTICE.—

(1) IN GENERAL.—The consulate of the foreign state of which an individual detained or arrested is a national shall be notified without delay if the individual requests consular notification under sub-

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section (a), and an appropriate officer or employee of the Federal Government or a State or local government shall provide any other consular notification required by an international agreement.

(2) FIRST APPEARANCE.—If an appropriate officer or employee of the Federal Government or a State or local government has not notified the consulate described in paragraph (1) regarding an individual who is detained pending criminal charges and the individual requests notification or notification is mandatory under a bilateral international agreement, notification shall occur not later than the first appearance of the individual before the court with jurisdiction over the charge.

(c) COMMUNICATION AND ACCESS.—An officer or employee of the Federal Government or a State or local government (including an officer or employee in charge of a facility where an individual who is not a national of the United States is held following detention or arrest) shall reasonably ensure that the individual detained or arrested is able to communicate freely with, and be visited by, officials of the consulate of the foreign state of which the individual detained or arrested is a national, consistent with the obligations described in section 2(a).

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(d) NO CAUSE OF ACTION.—Nothing in this section is intended to create any judicially or administratively enforceable right or benefit, substantive or procedural, by any party against the United States, its departments, agencies, or other entities, its officers or employees, or any other person or entity, including, an officer, employee, or agency of a State or local government.

SEC. 4. PETITION FOR REVIEW.

(a) IN GENERAL.—

(1) JURISDICTION.—Notwithstanding any other provision of law, a Federal court shall have jurisdiction to review the merits of a petition claiming a violation of Article 36(1) (b) or (c) of the Vienna Convention on Consular Relations, done at Vienna April 24, 1963, or a comparable provision of a bilateral international agreement addressing consular notification and access, filed by an individual convicted and sentenced to death by any Federal or State court before the date of enactment of this Act.

(2) DATE FOR EXECUTION.—If a date for the execution of an individual described in paragraph (1) has been set, the court shall grant a stay of execution if necessary to allow the court to review a petition filed under paragraph (1).

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(3) STANDARD.—To obtain relief, an individual described in paragraph (1) shall make a showing of actual prejudice to the criminal conviction or sentence as a result of the violation. The court may conduct an evidentiary hearing if necessary to supplement the record and, upon a finding of actual prejudice, shall order a new trial or sentencing proceeding.

(4) LIMITATIONS.—

(A) IN GENERAL.—A petition for review under this section shall be filed within 1 year of the later of—

(i) the date of enactment of this Act;

(ii) the date on which the Federal or State court judgment against the individual described in paragraph (1) became final by the conclusion of direct review or the expiration of the time for seeking such review; or

(iii) the date on which the impediment to filing a petition created by Federal or State action in violation of the Constitution or laws of the United States is removed, if the individual described in para-

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graph (1) was prevented from filing by such Federal or State action.

(B) TOLLING.—The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward the 1-year period of limitation.

(5) HABEAS PETITION.—A petition for review under this section shall be part of the first Federal habeas corpus application or motion for Federal collateral relief under chapter 153 of title 28, United States Code, filed by an individual, except that if an individual filed a Federal habeas corpus application or motion for Federal collateral relief before the date of enactment of this Act or if such application is required to be filed before the date that is 1 year after the date of enactment of this Act, such petition for review under this section shall be filed not later than 1 year after the enactment date or within the period prescribed by paragraph (4)(A)(iii), whichever is later. No petition filed in conformity with the requirements of the preceding sentence shall be considered a second or successive habeas corpus application or subjected to any bars to relief based on pre-

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enactment proceedings other than as specified in paragraph (3).

(6) APPEAL.—

(A) IN GENERAL.—A final order on a petition for review under paragraph (1) shall be subject to review on appeal by the court of appeals for the circuit in which the proceeding is held.

(B) APPEAL BY PETITIONER.—An individual described in paragraph (1) may appeal a final order on a petition for review under paragraph (1) only if a district or circuit judge issues a certificate of appealability. A district judge or circuit judge may issue a certificate of appealability under this subparagraph if the individual has made a substantial showing of actual prejudice to the criminal conviction or sentence of the individual as a result of a violation of Article 36(1) of the Vienna Convention on Consular Relations, done at Vienna April 24, 1963, or a comparable provision of a bilateral international agreement addressing consular notification and access.

(b) VIOLATION.—

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(1) IN GENERAL.—An individual not covered by subsection (a) who is arrested, detained, or held for trial on a charge that would expose the individual to a capital sentence if convicted may raise a claim of a violation of Article 36(1)(b) or (c) of the Vienna Convention on Consular Relations, done at Vienna April 24, 1963, or of a comparable provision of a bilateral international agreement addressing consular notification and access, at a reasonable time after the individual becomes aware of the violation, before the court with jurisdiction over the charge. Upon a finding of such a violation—

(A) the consulate of the foreign state of which the individual is a national shall be notified immediately by the detaining authority, and consular access to the individual shall be afforded in accordance with the provisions of the Vienna Convention on Consular Relations, done at Vienna April 24, 1963, or the comparable provisions of a bilateral international agreement addressing consular notification and access; and

(B) the court—

(i) shall postpone any proceedings to the extent the court determines necessary

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to allow for adequate opportunity for consular access and assistance; and

(ii) may enter necessary orders to facilitate consular access and assistance.

(2) EVIDENTIARY HEARINGS.—The court may conduct evidentiary hearings if necessary to resolve factual issues.

(3) RULE OF CONSTRUCTION.—Nothing in this subsection shall be construed to create any additional remedy.

SEC. 5. DEFINITIONS.

In this Act—

(1) the term "national of the United States" has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)); and

(2) the term "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

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June 28, 2011

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

We thank you for your extraordinary efforts to enact legislation that would facilitate U.S. compliance with its consular notification and access obligations and to express the Administration's strong support for S. 1194, the Consular Notification Compliance Act of 2011 (CNCA).

The millions of U.S. citizens who live and travel overseas, including many of the men and women of our Armed Forces, are accorded critical protections by international treaties that ensure that detained foreign nationals have access to their country's consulate. Consular assistance is one of the most important services that the United States provides its citizens abroad. Through our consulates, the United States searches for citizens overseas who are missing, visits citizens in detention overseas to ensure they receive fair and humane treatment, works to secure the release of those unjustly detained, and provides countless other consular services. Such assistance has proven vital time and again, as recent experiences in Egypt, Libya, Syria and elsewhere have shown. For U.S. citizens arrested abroad, the assistance of their consulate is often essential for them to gain knowledge about the foreign country's legal system and how to access a lawyer, to report concerns about treatment in detention, to send messages to their family, or to obtain needed food or medicine. Prompt access to U.S. consular officers prevents U.S. citizen prisoners from being lost in a foreign legal system.

The United States is best positioned to demand that foreign governments respect consular rights with respect to U.S. citizens abroad when we comply with these same obligations for foreign nationals in the United States. By sending a strong message about how seriously the United States takes its own consular notification and access obligations, the CNCA will prove enormously helpful to the U.S. Government in ensuring that U.S. citizens detained overseas can receive critical consular assistance.

The CNCA will help us ensure that the United States complies fully with our obligations to provide foreign nationals detained in the United States with the opportunity to have their consulate notified and to receive consular assistance. By setting forth the minimal, practical steps that federal, state, and local authorities must take to comply with the Vienna Convention on Consular Relations (VCCR) and similar bilateral international agreements, the CNCA will ensure early consular notification and access for foreign national defendants, avoiding future

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violations and potential claims of prejudice for those who are prosecuted and ultimately convicted. In this regard, the legislation is an invaluable complement to the extensive training efforts each of our Departments conducts in this area.

The CNCA appropriately balances the interests in preserving the efficiency of criminal proceedings, protecting the integrity of criminal convictions, and providing remedies for violation of consular notification rights. By allowing defendants facing capital charges to raise timely claims that authorities have failed to provide consular notification and access, and to ensure that notification and access is afforded at that time, the CNCA further minimizes the risk that a violation could later call into question the conviction or sentence. The CNCA provides a limited post-conviction remedy for defendants who were convicted and sentenced to death before the law becomes effective. To obtain relief, such defendants face a high bar: They must establish not only a violation of their consular notification rights but also that the violation resulted in actual prejudice. Going forward, the CNCA permits defendants who claim a violation of their VCCR rights an opportunity for meaningful access to their consulate but does not otherwise create any judicially enforceable rights.

After more than seven years and the efforts of two administrations, the CNCA will also finally satisfy U.S. obligations under the judgment of the International Court of Justice (ICJ) in *Case Concerning Avena and Other Mexican Nationals* (*Mex. v. U.S.*), 2004 I.C.J. 12 (Mar. 31). As we expressed in April 2010 letters to the Senate Judiciary Committee, this Administration believes that legislation is an optimal way to give domestic legal effect to the *Avena* judgment and to comply with the U.S. Supreme Court's decision in *Medellín v. Texas*, 552 U.S. 491 (2008). The CNCA will remove a long-standing obstacle in our relationship with Mexico and other important allies, and send a strong message to the international community about the U.S. commitment to honoring our international legal obligations.

The CNCA unmistakably benefits U.S. foreign policy interests. Many of our important allies and regional institutions with which we work closely—including Mexico, the United Kingdom, the European Union, Brazil and numerous other Latin American countries, and the Council of Europe, among others—have repeatedly and forcefully called upon the United States to fulfill obligations arising from *Avena* and prior ICJ cases finding notification and access violations. We understand that the Governments of Mexico and the United Kingdom have already written to Congress to express their strong support for this legislation.

This legislation is particularly important to our bilateral relationship with Mexico. Our law enforcement partnership with Mexico has reached unprecedented levels of cooperation in recent years. Continued noncompliance with *Avena* has become a significant irritant that jeopardizes other bilateral initiatives. Mexico considers the resolution of the *Avena* problem a priority for our bilateral agenda. The CNCA will help ensure that the excellent U.S.-Mexico cooperation in extradition and other judicial proceedings, the fight against drug trafficking and organized crime, and in a host of other areas continues apace.

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In sum, the CNCA is a carefully crafted, measured, and essential legislative solution to these critical concerns. We thank you again for your work towards finding an appropriate legislative solution to this matter of fundamental importance to our ability to protect Americans overseas and preserve some of our most vital international relationships.

Sincerely,

Eric H. Holder, Jr.
Attorney General

Hillary Rodham Clinton
Secretary of State

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EMBAJADA DE MÉXICO

Washington, DC
June 14, 2011

The Honorable Hillary Clinton
U.S. Secretary of State
2201 C Street NW
Washington, DC 20520

Dear Secretary Clinton,

On behalf of the Government of Mexico I am writing to express our deepest concern regarding the imminent execution of Humberto Leal García, one of the 51 Mexican nationals whose cases were the subject of proceedings before the International Court of Justice (ICJ) in *Avena and Other Mexican Nationals*. Texas intends to execute Mr. Leal on July 7, even though he has not yet received the review and reconsideration mandated by the ICJ's judgment.

The Government of Mexico has never called into question the heinous nature of the crimes attributed to Mr. Leal, and in no way condones violent crime. Nor are we challenging the death penalty *per se*. However, the United States made a commitment to Mexico and to its other treaty partners to abide by the rules of the ICJ. Mexico's goal since it resorted to the ICJ has been solely to ensure due process and due compliance with consular notification rights afforded by the Vienna Convention on Consular Relations to all individuals travelling or residing abroad, including U.S. citizens.

The Government of Mexico is encouraged by the introduction today in the U.S. Senate of legislation that would implement the *Avena* judgment. We recognize this is an important step in the right direction. However, it seems clear that there is not enough time for Congress to pass the legislation before Mr. Leal's execution date. Therefore, it is of paramount importance that the U.S. Administration intervenes in order to prevent the execution from taking place, before Congress has had an opportunity to finally legislate regarding the manner in which the US should comply with its international obligations.

The continued non-compliance with the ICJ's decision has already placed great strain on our bilateral relationship. The execution of Jose Ernesto Medellin in August 2008, which took place in violation of the ICJ's order of provisional measures, was in

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direct breach of the United States' international legal obligation to comply with the *Avena* judgment. In January 2009, the ICJ reiterated that the United States' commitments under *Avena* "must be met within a reasonable period of time," and emphasized that "the obligation upon the United States not to execute . . . Humberto Leal García . . . pending review and reconsideration being afforded to [him] is fully intact." Nonetheless, the state of Texas apparently intends to ignore the ICJ by carrying out his execution without providing the requisite review and reconsideration.

While our bilateral agenda is moving forward as a result of a joint commitment to deepen and widen cooperation and dialogue, as I wrote in a letter to your Legal Adviser dated July 7, 2010, a second execution in violation of the ICJ's judgment would seriously jeopardize the ability of the Government of Mexico to continue working collaboratively with the United States on a number of joint ventures, including extraditions, mutual judicial assistance, and our efforts to strengthen our common border.

Furthermore, another execution of a Mexican national in direct violation of international law will undoubtedly affect public opinion in Mexico. Under these circumstances, in addition to the likely impact on dialogue and cooperation, my government would face significant pressure from Mexico's Congress to revise our cooperation and to re-examine our commitment to other bilateral programs. It serves neither the United States nor the Mexico-US relationship if the U.S. cannot live up to its treaty obligations.

In light of the potential damage to our bilateral relationship, I respectfully request your full-fledged support to obtain a stay of execution for Mr. Leal. In particular, I ask that the U.S. Government support Mr. Leal's request for a stay of execution in the U.S. Supreme Court, particularly in light of the legislation that was introduced today by Senator Patrick Leahy. Without the intervention of the U.S. Government in support of Mr. Leal, his execution will be practically a foregone conclusion.

I would like to take this opportunity to reiterate to you the assurances of my high esteem and consideration.

Sincerely,

Arturo Sarukhan
Ambassador of Mexico

cc: The Honorable Eric Holder
U. S. Attorney General,
Department of Justice

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United States of America

Congressional Record

PROCEEDINGS AND DEBATES OF THE 112th CONGRESS, FIRST SESSION

Vol. 157 WASHINGTON, WEDNESDAY, JUNE 29, 2011 No. 95

House of Representatives

The House was not in session today. Its next meeting will be held on Friday, July 1, 2011, at 10 a.m.

Senate

WEDNESDAY, JUNE 29, 2011

The Senate met at 9:30 a.m. and was called to order by the Honorable KIRSTEN GILLIBRAND, a Senator from the State of New York.

PRAYER

The Chaplain, Dr. Barry C. Black, offered the following prayer:

Let us pray.

Lord of wonders beyond all majesty, You are holy. We lift our hearts to You today in gratitude for Your goodness and mercy that continue to follow us. Today, guide our lawmakers by Your grace. Lord, show them Your ways; teach them Your path. May the law of love direct their labors, opening the door of new opportunities for service. Empower them to turn from the thoughts, words, and deeds that violate righteousness.

We pray in Your holy Name. Amen.

PLEDGE OF ALLEGIANCE

The Honorable KIRSTEN GILLIBRAND led the Pledge of Allegiance, as follows:

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all.

APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

The PRESIDING OFFICER. The clerk will please read a communication to the Senate from the President pro tempore (Mr. INOUYE).

The assistant legislative clerk read the following letter:

U.S. SENATE,
PRESIDENT PRO TEMPORE,
Washington, DC, June 29, 2011.

To the Senate:

Under the provisions of rule I, paragraph 3, of the Standing Rules of the Senate, I hereby appoint the Honorable KIRSTEN GILLIBRAND, a Senator from the State of New York, to perform the duties of the Chair.

DANIEL K. INOUYE,
President pro tempore.

Mrs. GILLIBRAND thereupon assumed the chair as Acting President pro tempore.

RECOGNITION OF THE MAJORITY LEADER

The ACTING PRESIDENT pro tempore. The majority leader is recognized.

SCHEDULE

Mr. REID. Madam President, after leader remarks, the Senate will be in morning business for 1 hour. The Republicans will control the first half and the majority the final half.

Following morning business, the Senate will resume consideration of S. Res. 679, the Presidential Appointment Efficiency and Streamlining Act. At 11 a.m. there will be up to five rollcall votes on several amendments and passage of S. 679. We are hopeful some of the amendments will be disposed of by voice vote. Following disposition of the Presidential appointment bill, the Senate will begin consideration of S. Res. 116 which comes out of the Rules Committee. Additional rollcall votes on amendments to the resolution are expected today.

MEDICARE

Mr. REID. Madam President, often very good ideas, no matter how important, take time to ripen. Even when they are ripe they need dedicated advocates to make them a reality. Let me give one example.

President Harry Truman once said:

Millions of our citizens do not now have a full measure of opportunity to achieve and enjoy good health. Millions do not now have protection or security against the economic effects of sickness. And the time has now arrived for action to help them attain that opportunity and help them get that protection.

But in 1945 when he spoke those words to Congress, the time had not yet truly arrived. In fact, it would be another 20 years before Truman's good idea was realized. It would be 20 years before Truman became the first of 19 million Americans to receive a Medicare card.

President Lyndon Johnson signed Medicare and Medicaid into law in the Truman Presidential Library in Independence, MO. The law took effect almost a year later, 45 years ago this week, on July 1, 1966.

At the time Medicare took effect, only half of Americans 65 and older had access to health care coverage. A third of American seniors lived in poverty. "Poverty was so common that we did not know it had a name," President Johnson said, describing a time before Medicare.

Today, virtually every American over 65 has access to health care and the number of seniors who live below the poverty line has dropped by 75 percent. That is no accident. Medicare provides 47 million Americans with the

• This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.

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complete its work and have the FBI Director in place at the end of the summer. That agreement would take the form of a unanimous consent agreement in the Senate, entered into by all Senators, and locked in on the RECORD so that it could not be changed without unanimous consent. That has not occurred. That is the only way to ensure Senate action on a nomination before August 3. The House would also have to agree to such an approach.

Senator COBURN has been unable to convince his leadership and the Republican caucus to agree. It may be because some do not want to agree. It may be because some do not want to give up the "leverage" such a nomination might provide to them on other matters. Maybe they just do not want to make anything too "easy" on this President. Whatever the reasons, no such agreement has been forthcoming in the weeks it has been under consideration.

In fact, at the Judiciary Committee business meeting on the bill, when Senator COBURN could not offer the assurances required to lock in prompt and timely consideration of a subsequent nomination of the FBI Director after enactment of legislation and before August 3, he did suggest that his side of the aisle would forego several steps of the standard process for considering nominees. He offered to waive the questionnaire, the background check, and the confirmation hearing on Director Mueller. But this commitment was illusory, because not even all of the Republican members of the Judiciary Committee agreed. Senator CORNYN, having questioned Director Mueller's "management capacity," indicated that he wanted confirmation hearings and the opportunity to ask questions. Of course, the Senator from Texas was within his rights to say so. But that shows the practical difficulties of following Senator COBURN's complicated, two-part scenario with no guarantee of it being completed by August 3.

Republican Senators lectured us on the ease with which the majority leader should be able to obtain cloture on a new nomination of Director Mueller. That again makes my point. Without a binding agreement, it could take days to consider the nomination, perhaps a full week.

We have just witnessed Senate Republicans filibustering for the first time in American history the nomination of the Deputy Attorney General of the United States. They did that just last month. While Senator CORNYN opined that the renomination of Director Mueller should be able to get 60 votes for cloture, and we should be able to end a filibuster of the nomination on the Senate floor, he also said that he could not control other Republican Senators.

To complete action in accordance with Senator COBURN's alternative plan would mean not only passing legislation but the Senate receiving, considering and confirming the renomination of Director Mueller. I was chairman of the Judiciary Committee back in 2001 when the Senate considered and confirmed Director Mueller's initial nomination within two weeks. I worked hard to make that happen. Regrettably, given the current practices of Senate Republicans, and their unwillingness to agree on expedited treatment for President Obama's nominations, it is foolhardy in my judgment to think that all Senate Republicans will cooperate without the binding force of a unanimous consent entered in the RECORD.

Let me mention just one more recent example. Consider the time line of the nomination of the Assistant Attorney General for the National Security Division at the Department of Justice. The nominee was approved unanimously by the Senate Judiciary Committee and unanimously by the Senate Select Committee on Intelligence, and approved unanimously by the Senate just yesterday. That nomination took 15 weeks for the Senate to consider—and she was approved unanimously. It took more than a month just to schedule the Senate vote after the nomination was reported unanimously by the Senate Select Committee on Intelligence, and that was 2½ weeks after it was unanimously reported by the Senate Judiciary Committee. This was a nominee with whom many of us were familiar and who faced no opposition.

Of course, in the case of the FBI Director, there is no necessity to require a new nomination. The simple one-time extension contained in S. 1103 does the job. It provides all the authority needed for the President to ask Director Mueller to stay on and for him to do so without additional action by the Senate. The separate renomination of Director Mueller is not required.

As I have said, all Senate Democrats are prepared to take up and pass S. 1103, and send it to the House of Representatives for it to take final action before August 3. That is what we should be doing. We should do that now, before the Fourth of July recess. There is no good reason for delay. All that is lacking is Senate Republicans' consent.

So, as they stall in moving legislation to respond to President Obama's request to extend Director Mueller's term, Senate Republicans will not commit to the unanimous consent request necessary to allow Senator COBURN's alternative to become a possibility. Seven of the eight Republican members of the Senate Judiciary Committee voted against the bill to extend Director Mueller's term. Senator COBURN had said that if his alternative was not adopted by the committee, he would vote for the bill, but then he changed his mind and voted against. He then said that he will vote for the bill, S. 1103, when it is considered by the Senate, but Senate Republicans—perhaps including Senator COBURN himself—are now objecting to considering it. We have lost another two weeks since the bill was reported by the Judiciary Committee.

Finally, I observe that this is not the only matter the Senate needs to consider before August 3. There is the matter of the United States' default unless the debt ceiling is raised by that time. There is the need to pass the America Invents Act, as passed by the House, to spur innovation and jobs. There are currently 10 executive nominations ready for Senate action reported by the Judiciary Committee and 18 judicial nominations ready for final consideration to address the judicial vacancies crisis. There is much to do, little time, and even less cooperation.

This important legislation, S. 1103, would fulfill the President's request that Congress create a one-time exception to the statutory 10-year term of the FBI Director in order to extend the term of the incumbent FBI Director for 2 additional years. Given the continuing threat to our Nation, especially with the tenth anniversary of the September 11, 2001, attacks approaching, and the need to provide continuity and stability on the President's national security team, it is important that we respond to the President's request and enact this necessary legislation swiftly. The incumbent FBI Director's term otherwise expires on August 3, 2011. I urge the Senate to take up this critical legislation and pass it without further delay.

CONSULAR NOTIFICATION COMPLIANCE ACT

Mr. LEAHY. Mr. President, on June 14, 2011, I introduced the Consular Notification Compliance Act. This legislation will help bring the United States into compliance with its obligations under the Vienna Convention on Consular Relations, VCCR, and is critical to ensuring the protection of Americans traveling overseas.

Each year, thousands of Americans are arrested and imprisoned when they are in foreign countries studying, working, serving in the military, or traveling. From the moment they are detained, their safety and well-being depends, often entirely, on the ability of U.S. consular officials to meet with them, monitor their treatment, help them obtain legal assistance, and connect them to family back home. That access is protected by the consular notification provisions of the VCCR, but it only functions effectively if every country meets its obligations under the treaty—including the United States.

As we now know, in some instances, the United States has not been meeting those obligations. There are currently more than 100 foreign nationals on death row in the United States, most of whom were never told of their right to contact their consulate, and their consulate was never notified of their arrest, trial, conviction, or sentence. This failure to comply with our treaty obligations undercuts our ability to

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protect Americans abroad and deeply damages our image as a country that abides by its promises and the rule of law. It would also be completely unacceptable to us if our citizens were treated in this manner.

The Consular Notification Compliance Act seeks to bring the United States one step closer to compliance with the convention. It is a narrowly crafted solution. It focuses only on the most serious cases—those involving the death penalty—but it is a significant step in the right direction and we need to work together to pass it quickly. Texas is poised to execute the next foreign national affected by this failure to comply with the treaty on July 7, 2011. He was not notified of his right to consular assistance, and the Government of Mexico has expressed grave concerns about the case. We do not want this execution to be interpreted as a sign that the United States does not take its treaty obligations seriously, or to further damage relations with an important ally with which we share a border. That message puts American lives at risk.

Since introduction of the Consular Notification and Compliance Act, the Department of Justice and the Department of State have worked with me to explain the importance of the bill, its limited nature, and the urgent need to see it passed. On June 28, Attorney General Holder and Secretary Clinton wrote to me in support of the "carefully crafted, measured, and essential legislative solution" included in the Consular Notification and Compliance Act. I will ask consent to have a copy of the letter printed in the RECORD at the conclusion of my remarks. We have already had productive discussions with Republicans and Democrats from both the House and Senate. I appreciate that others are willing to work together to address this critical issue.

I also want to note all of the favorable commentary the bill has generated, including multiple editorials in major newspapers and numerous letters of support from across the political spectrum. I also will ask that a selection of those be printed in the RECORD following my remarks.

Everyone agrees that this legislation is not about giving breaks to criminals. It is not about expanding habeas corpus relief. It is not about weakening the death penalty. This bill is about three things only. It is about protecting Americans when they work, travel, and serve in the military in foreign countries. It is about fulfilling our obligations and upholding the rule of law. And it is about removing a significant impediment to full and complete cooperation with our international allies on national security and law enforcement efforts that keep Americans safe.

The bottom line is this—our failure to comply with our legal obligations places Americans at risk. As chairman of the Senate Judiciary Committee, I am announcing that I intend to hold a hearing on this critical issue in July. We must work together, and we must act now.

Mr. President, I ask unanimous consent to have printed in the RECORD the letters and editorials to which I referred.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

JUNE 28, 2011.

Hon. PATRICK J. LEAHY,
Chairman, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: We thank you for your extraordinary efforts to enact legislation that would facilitate U.S. compliance with its consular notification and access obligations and to express the Administration's strong support for S. 1194, the Consular Notification Compliance Act of 2011 (CNCA).

The millions of U.S. citizens who live and travel overseas, including many of the men and women of our Armed Forces, are accorded critical protections by international treaties that ensure that detained foreign nationals have access to their country's consulate. Consular assistance is one of the most important services that the United States provides its citizens abroad. Through our consulates, the United States searches for citizens overseas who are missing, visits citizens in detention overseas to ensure they receive fair and humane treatment, works to secure the release of those unjustly detained, and provides countless other consular services. Such assistance has proven vital time and again, as recent experiences in Egypt, Libya, Syria and elsewhere have shown. For U.S. citizens arrested abroad, the assistance of their consulate is often essential for them to gain knowledge about the foreign country's legal system and how to access a lawyer, to report concerns about treatment in detention, to send messages to their family, or to obtain needed food or medicine. Prompt access to U.S. consular officers prevents U.S. citizen prisoners from being lost in a foreign legal system.

The United States is best positioned to demand that foreign governments respect consular rights with respect to U.S. citizens abroad when we comply with these same obligations for foreign nationals in the United States. By sending a strong message about how seriously the United States takes its own consular notification and access obligations, the CNCA will prove enormously helpful to the U.S. Government in ensuring that U.S. citizens detained overseas can receive critical consular assistance.

The CNCA will help us ensure that the United States complies fully with our obligations to provide foreign nationals detained in the United States with the opportunity to have their consulate notified and to receive consular assistance. By setting forth the minimal, practical steps that federal, state, and local authorities must take to comply with the Vienna Convention on Consular Relations (VCCR) and similar bilateral international agreements, the CNCA will ensure early consular notification and access for foreign national defendants, avoiding future violations and potential claims of prejudice for those who are prosecuted and ultimately convicted. In this regard, the legislation is an invaluable complement to the extensive training efforts each of our Departments conducts in this area.

The CNCA appropriately balances the interests in preserving the efficiency of criminal proceedings, protecting the integrity of criminal convictions, and providing remedies for violation of consular notification rights. By allowing defendants facing capital charges to raise timely claims that authorities have failed to provide consular notification and access, and to ensure that notification and access is afforded at that time, the CNCA further minimizes the risk that a violation could later call into question the conviction or sentence. The CNCA provides a limited post-conviction remedy for defendants who were convicted and sentenced to death before the law becomes effective. To obtain relief, such defendants face a high bar: They must establish not only a violation of their consular notification rights but also that the violation resulted in actual prejudice. Going forward, the CNCA permits defendants who claim a violation of their VCCR rights an opportunity for meaningful access to their consulate but does not otherwise create any judicially enforceable rights.

After more than seven years and the efforts of two administrations, the CNCA will also finally satisfy U.S. obligations under the judgment of the International Court of Justice (ICJ) in *Case Concerning Avena and Other Mexican Nationals (Mex. v. US.)*, 2004 I.C.J. 12 (Mar. 31). As we expressed in April 2010 letters to the Senate Judiciary Committee, this Administration believes that legislation is an optimal way to give domestic legal effect to the Avena judgment and to comply with the U.S. Supreme Court's decision in *Medellin v. Texas*, 552 U.S. 491 (2008). The CNCA will remove a long-standing obstacle in our relationship with Mexico and other important allies, and send a strong message to the international community about the U.S. commitment to honoring our international legal obligations.

The CNCA unmistakably benefits U.S. foreign policy interests. Many of our important allies and regional institutions with which we work closely—including Mexico, the United Kingdom, the European Union, Brazil and numerous other Latin American countries, and the Council of Europe, among others—have repeatedly and forcefully called upon the United States to fulfill obligations arising from Avena and prior ICJ cases finding notification and access violations. We understand that the Governments of Mexico and the United Kingdom have already written to Congress to express their strong support for this legislation.

This legislation is particularly important to our bilateral relationship with Mexico. Our law enforcement partnership with Mexico has reached unprecedented levels of cooperation in recent years. Continued noncompliance with Avena has become a significant irritant that jeopardizes other bilateral initiatives. Mexico considers the resolution of the Avena problem a priority for our bilateral agenda. The CNCA will help ensure that the excellent U.S.-Mexico cooperation in extradition and other judicial proceedings, the fight against drug trafficking and organized crime, and in a host of other areas continues apace.

In sum, the CNCA is a carefully crafted, measured, and essential legislative solution to these critical concerns. We thank you again for your work towards finding an appropriate legislative solution to this matter of fundamental importance to our ability to protect Americans overseas and preserve some of our most vital international relationships.

Sincerely,

ERIC H. HOLDER, JR.,
Attorney General.
HILLARY RODHAM CLINTON,
Secretary of State.

[From the Washington Post, June 13, 2011]

WHY THE U.S. SHOULD ALLOW ARRESTED FOREIGNERS TO CONTACT THEIR CONSULATES

Humberto Leal Jr. is scheduled to be put to death by the state of Texas next month

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Additional information is on file with the Department of Justice, Washington, D.C.

for the 1994 murder of a 16-year-old girl. Like so many cases involving capital punishment, Mr. Leal's has generated controversy, but not for the typical reasons.

Mr. Leal is a Mexican national. When he was arrested, Texas officials failed to advise him of his right to communicate with his country's embassy as required by the Vienna Convention on Consular Relations. The United States, Mexico and some 160 other countries are signatories to the convention. Mr. Leal is one of roughly 40 Mexican nationals who were not advised about consular access and who sit on death row in this country.

Mexico filed a grievance on behalf of its nationals and prevailed in 2004 before the International Court of Justice (ICJ), the judicial arm of the United Nations. The ICJ concluded that the United States was obligated to comply with the treaty and that it should review these cases to determine whether the defendants had been harmed by the lack of notification.

Texas, where the majority of these inmates are held, balked. Three years ago, the state executed Jose Ernesto Medellin, another Mexican national who was not informed of his right to consular access and who was denied additional review. The state is likely to take the same approach in the Leal case. "Here, in Texas, if you commit terrible and heinous crimes you're going to pay the ultimate price," says Katherine Cesinger, press secretary to Gov. Rick Perry.

This misses the point entirely. This is not about coddling criminals nor is it a referendum on the death penalty. It is about a country's obligation to honor its treaty commitments. The United States must comply with the Vienna Convention—and demonstrate good faith in addressing past mistakes—if U.S. citizens abroad are to be afforded the same rights and protections.

Sen. Patrick J. Leahy (D–Vt.) is expected to introduce legislation as soon as this week to provide meaningful review in federal court for those denied consular access. The legislation should be narrowly tailored and mandate that the legal proceedings focus solely on whether denial of access seriously prejudiced an inmate's ability to defend against charges. The bar for success should be high, and only those who can provide compelling evidence of such harm should be allowed a new trial or benefit from a reduced sentence.

To avoid this problem in the future, federal and state governments should be diligent about abiding by the treaty's mandates. The State Department should continue its outreach to state and local governments to impress upon law enforcement officials the importance of the consular notification. Complying with the treaty is not only the right thing to do; it is the smart and self-interested thing to do.

[From the New York Times, June 17, 2011]

THE TREATY AND THE LAW

Humberto Leal Garcia Jr., a Mexican citizen who faces execution in Texas next month, has petitioned Gov. Rick Perry for a six-month reprieve. He is asking for a stay under a vital international law, the Vienna Convention on Consular Relations, which requires that foreign nationals who are arrested be told of their right to have their embassy notified of that arrest and to ask for help.

In recent years, the treaty has provided important protection for Americans who have been detained in Iran, North Korea and elsewhere. Mr. Leal was not notified after his arrest of his right to contact his embassy. But the Supreme Court ruled in 2008 that Texas did not need to comply with the treaty because there is no federal law requiring that states do so.

Senator Patrick Leahy of Vermont on Tuesday introduced a bill that makes clear that federal law requires that states tell foreign nationals who have been arrested that they can contact their consulates for help.

For those who were convicted and sentenced without being told, the bill would let them ask a federal court to review their case and decide whether the outcome would have been different if they had had diplomatic help. After the bill was introduced, Mr. Leal petitioned Federal District Court for a stay to keep Texas from "rushing to execute" him before Congress has time to act.

Mr. Leal, convicted of murder during a sexual assault, had grossly incompetent legal representation. If he had been given access to a Mexican diplomat, he would have had a chance at better counsel and likely the opportunity to strike a plea deal, avoiding the death penalty.

For the sake of justice, the governor and court should grant the stays. For the protection of foreigners arrested here, and American citizens arrested abroad, Congress should pass Senator Leahy's bill.

[From the Austin American-Statesman, June 10, 2011]

EXECUTION CASE IMPORTANT TO INTERNATIONAL RELATIONS

The Golden Rule of life also applies to the tricky business of international relations. What we do to non-Americans in our country we can reasonably expect to be done unto Americans in other countries.

It is for that reason that Gov. Rick Perry and the Texas Board of Pardons and Paroles—both in the uncommon position of making a decision with international impact—should commute or postpone the death sentence of Humberto Leal, a Mexican raised in Texas, scheduled to die July 7 for the 1994 murder of Adria Sauceda, 16, in Bexar County.

The key issue in this case at this point is not whether Leal committed the crime. Also not central now are the circumstances involving Leal, including sexual abuse by a priest, a challenging family history and other factors that, though significant, fail to add up to justification for murder. They could, however, count as mitigating factors that argue for a life sentence.

It's what happened after Sauceda was killed that is at issue. More specifically, it's what didn't happen. Despite the Vienna Convention on Consular Relations requirements, Leal was not informed of his right to contact Mexican officials to seek legal assistance. Records indicate that he was not aware of that right until told about it by a fellow death row inmate.

Instead of getting legal help from Mexican consular officials, who have a track record of providing quality legal representation for Mexicans facing the death penalty in the U.S., Leal was represented by a court-appointed team that included a lawyer who twice had his license suspended.

Back in 2004, the International Court of Justice said Leal was entitled to a hearing to determine the extent of harm he suffered as a result of the lack of consular access. A U.S. Supreme Court ruling has said the U.S. must comply with the decision by the international court. Texas, citing state law, said no such hearing could take place. Congress now is poised to consider legislation, to be filed in coming weeks, that would establish a procedure for a federal court hearing on the extent of harm caused to Leal because he was not advised of his right to contact Mexican officials.

In a clemency petition filed this week, an impressive list of former U.S. diplomats, retired military leaders and others concerned about international matters urged a stay of execution to grant Congress time to deal with this case.

At stake, they said, are the consular rights of Americans who become entangled in legal problems while out of the country.

"For Texas to proceed with (Leal's) execution prior to full compliance with these treaty obligations would endanger the interests of American citizens and the United States around the world," John B. Bellinger III, a State Department legal adviser in the George W. Bush administration, said in a letter signed by others and delivered to Perry.

The former military leaders told Perry that "improving U.S. enforcement of its consular notification and legal access obligations will help protect American citizens detained abroad, including U.S. military personnel and the families stationed overseas."

Sandra L. Babcock, a Northwestern University law professor representing Leal, said he would not have been convicted if he had received proper consular assistance. We have no way of knowing that. But there is no arguing with Babcock's contention that "with consular access, Mr. Leal would have had competent lawyers and expert assistance that would have transformed the quality of his defense."

And, as she noted, Mexican officials have developed expertise in helping Mexicans facing the death penalty in the U.S.

"It really is a very modest remedy we are talking about," Babcock said.

Modest, indeed, but with important international ramifications.

[From the Houston Chronicle, June 22, 2011]

KEEPING OUR WORD: SCHEDULED TEXAS EXECUTION VIOLATES TREATY AND ENDANGERS AMERICANS ABROAD

Americans traveling abroad are protected, whether they are aware of it or not, by a treaty called the Vienna Convention on Consular Relations, ratified by about 170 countries, which guarantees them access to U.S. consular assistance if they are detained or arrested in a foreign country. In 2010, more than 6,600 Americans were arrested abroad, and more than 3,000 were incarcerated. Many of them benefited from the protections of this treaty.

But unfortunately, the U.S. has repeatedly failed to offer those same protections to foreigners on U.S. soil. The most egregious of these violations is the denial of consular assistance to foreign nationals convicted and sentenced to death. (Currently, about 100 foreign nationals are on U.S. death rows.) And in a particularly urgent case, one of those individuals whose rights were violated, a Mexican national named Humberto Leal Garcia, is scheduled to be executed on July 7 in Huntsville.

Because a bill has been introduced to bring the U.S. into compliance with the treaty, Leal's attorneys have filed a federal petition and a motion for a stay of execution so that Leal will be alive and eligible for the remedies of this legislation when it becomes law.

There are compelling reasons why these petitions should be granted. Chief among them is the fact that this pending legislation will allow for review of cases like Leal's, said his attorney Sandra Babcock, "where lack of consular assistance may well have made the difference between life and death. That's why the consular access really matters." Mexico provides top-flight legal assistance to its nationals under such circumstances.

Leal's court-appointed attorneys were ineffective and inexperienced, Babcock told the Chronicle, resulting in harm to Leal in both the guilt-or-innocence and the penalty phases of his trial. According to Babcock,

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they failed to challenge the prosecution's "junk science" and flawed DNA evidence or to present expert testimony on Leal's learning disabilities and brain damage. Leal, sentenced to death for the 1994 rape and murder of a 16-year-old girl, was then 21 and had no criminal record.

Also, there is no dispute that this treaty is the law: In 2003, Mexico filed suit against the U.S., claiming that 51 Mexican nationals sentenced to death in U.S. courts had been denied consular access. (Leal was one of them.) In 2004, the International Court of Justice ruled that the U.S. must review those individuals' cases. The issue was finally resolved, in 2008, by the U.S. Supreme Court, which unanimously supported the ICJ decision but ruled that it was up to Congress to implement it.

That is what Senate Judiciary Committee Chairman Patrick Leahy addressed last week, when he introduced legislation to allow federal courts to review such cases, and to increase compliance and provide remedies.

And finally, as Leahy eloquently stated, the U.S. failure to honor its treaty obligations "undercuts our ability to protect Americans abroad and deeply damages our image as a country that abides by its promises and the rule of law. It would also be completely unacceptable to us if our citizens were treated in this manner."

For all of these reasons, we urge Congress to act swiftly to pass this legislation, and we urge Gov. Perry to give Leal, and others in his situation, the time to benefit from its remedies if they are shown to have been harmed.

PERRY, UTAH

Mr. HATCH. Mr. President, I rise today to pay tribute to the great city of Perry, UT, on the 100th anniversary of its incorporation.

Today, Perry is a beautiful city of nearly 4,000 residents nestled at the foot of northern Utah's majestic Wasatch Mountains. Its fame and acclaim are extensive for a variety of reasons.

First, it is the apple of many a person's eye because of its location on Utah's famed Fruit Way. Its fruit stands along highway 89 are laden with apples, cherries, apricots, peaches, pears and other produce. I have never found any fruit nearly so sweet in all my travels.

Perry is also home to the legendary Maddox Ranch House, where succulent steaks, fried chicken, homemade rolls and other fare have been food for thought and the palate for locals and many a weary traveler—this Senator, included—for more than six decades.

Best of all, though, are the wonderful residents of Perry. I have always been unfailingly impressed with their work ethic and civic-mindedness their eagerness and willingness to pitch in and build a better future and community for their children and grandchildren.

They also are warm and welcoming. Whenever people pop in, they never seem to be put out. It has been my experience that they are always eager to lend a hand or extend the hand of friendship. I always feel better for being there. It doesn't hurt that my wife Elaine hails from nearby Newton. Little wonder that every time I am in Perry I feel right at home.

Great places like Perry don't just happen. It takes vision and hard work—a trait Orrin Porter Rockwell and his brother Merritt undoubtedly had in abundance when they laid claim to a piece of land in the area adjacent Porter Spring. They were followed in 1851 by the Mormon pioneers, settlers of faith and fortitude who befriended the Native Americans there and founded what became known as Three Mile Creek.

Many milestones have come and gone since then. In 1861 the first school was built, followed by the groundbreaking for the Northern Utah Railroad 10 years later. And the settlers also weathered some adversity, including harsh winters and the Great Flood of 1896. Two years later, Three Mile Creek was renamed Perry in honor of Orrin Alonzo Perry, who served as an LDS bishop there for more than two decades.

June 19, 1911, the date of Perry's incorporation, was another major event and marked a new beginning. Over the ensuing years, the people of Perry, under the guidance of some remarkable and visionary leaders, kept right on building, bringing electricity, drinking water, a town hall and more schools to the city. Just this year, Perry added a wastewater treatment plant and a soccer park to the mix. And I trust many more chapters remain to be written in Perry's illustrious history.

As Perry celebrates its centennial over the Fourth of July weekend, I salute its visionary and hardworking citizens, both past and present, who have made the city what it is today. I am sure Orrin Porter Rockwell and Orrin Alonzo Perry would be proud. You can be certain that this Orrin is.

EXPLOITING GAPS IN U.S. GUN LAWS

Mr. LEVIN. Mr. President, I have long sought to bring attention to the dangerous gaps in U.S. gun laws, hoping the exposure would lead to the passage of commonsense firearm legislation. To those of us who feel that Congress can and should play a role in protecting American neighborhoods from the scourge of gun violence, enacting laws to ensure firearms stay out of the hands of dangerous people seems like a no-brainer. Unfortunately, the National Rifle Association, despite broad support for sensible gun safety laws among Americans across the political spectrum, has successfully blocked much-needed legislative changes.

Recently a startling new voice joined the discussion highlighting the weaknesses in our gun laws, most notably how we administer firearm background checks. Consider the following quote describing the so-called gun show loophole:

America is absolutely awash with easily obtainable firearms. You can go down to a gun show at the local convention center and come away with a fully automatic assault rifle without a background check and, most likely, without having to show an identification card.

While this quote does not break any new ground regarding the dangers of the gun show loophole, it is noteworthy because of the person who said it. These were not the words of a Member of Congress, advocating for legislation, nor were they the words of a spokesperson of groups like Mayors Against Illegal Guns or the Brady Campaign. This quote is taken from an Internet video message recorded by Adam Gadahn, an American-born, confirmed al-Qaida operative.

In the video, Gadahn speaks to al-Qaida followers and sympathizers, describing the ease with which a person can purchase a firearm from a private seller without a background check, often with no questions asked. In fact, this video is not merely a description of the loopholes in U.S. gun laws, it is an exhortation to would-be terrorists to exploit these loopholes and kill innocent Americans. To wit, the video ends with Gadahn asking his viewers, "What are you waiting for?"

This video is a chilling reminder that dangerous loopholes exist in U.S. gun laws, weaknesses that terrorists are actively trying to exploit. While Gadahn is not entirely accurate—a person cannot purchase a "fully automatic assault" rifle at a gun show without government knowledge—he correctly describes just how simple it is for dangerous individuals to acquire deadly weapons in the United States, including semi-automatic assault rifles.

I urge my colleagues to take up and pass two gun safety bills introduced by Senator FRANK LAUTENBERG: the Gun Show Background Check Act, S. 35, which would close the loophole that makes it easy for criminals, terrorists and other prohibited buyers to evade background checks and buy guns from private citizens at gun shows; and the Denying Firearms and Explosives to Dangerous Terrorists Act, S. 34, which would close the loophole in Federal law that hinders the ability of law enforcement to keep firearms out of the hands of terrorists by authorizing the Attorney General to deny the sale of a firearm when a background check reveals that the prospective purchaser is a known or suspected terrorist.

Congressional action should not require such stark evidence that al-Qaida and like-minded criminals are trying to use weak U.S. gun laws to carry out terrorist attacks against Americans. But the evidence—clear, explicit and terrifying—is here nonetheless. The time to act is long overdue.

UTAH SHAKESPEARE FESTIVAL

Mr. HATCH. Mr. President, today I wish to pay tribute to the Utah Shakespeare Festival, the Nation's premier regional theater and one of our State's crown jewels, on the occasion of its 50th anniversary.

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EUROPEAN UNION
DELEGATION TO THE UNITED STATES OF AMERICA

The Head of Delegation

Washington, 13 June 2011
PSD/LV/BW/ip D(2011) 1775

The Honorable
Rick Perry
Governor, State of Texas
207 Statehouse
Springfield, Illinois 62706

Fax: 217 524-4049

Dear Governor,

The European Union is writing to make an urgent appeal on behalf of Mr. Humberto Leal, whom we understand has received a date for execution of July 7, 2011.

The European Union recognizes that a terrible crime lies at the heart of this case and extends its sympathy to the family and survivors of the victim.

The European Union urges a reprieve be granted to Mr. Leal pending legislative action to bring the United States into compliance with its treaty obligations.

On March 31, 2004, the International Court of Justice (ICJ) ruled in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) that the United States had violated Article 36 of the Vienna Convention on Consular Relations and held that Mr. Leal is entitled to review and reconsideration of his sentence to determine whether, and how, he was prejudiced by the violation of his consular rights. The European Union acknowledges that the United States has recognized its international legal obligation to implement the remedies mandated by the ICJ in this judgment. However, in Medellin v. Texas, the United States Supreme Court held that Congress must pass legislation implementing the Avena judgment before it can be enforced by U.S. courts.

All Member States of the European Union are party to the Vienna Convention on Consular Relations and to the United Nations Charter. The EU considers the respect for reciprocal treaty obligations based rights to be of vital importance to all aspects of the transatlantic relationship. As such, the EU has an interest in securing compliance with rights guaranteed under Article 36.

2175 K Street NW, Washington, DC 20037-1831 Telephone: (202) 862.9500. Telefax: (202) 429.1766.
E-Mail Address: delegation-washington@eeas.europa.eu

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European Union Member States consider consular access to be of critical importance. A foreign national faces unique disadvantages when left to navigate a foreign country's legal system in the absence of support from his home nation, even if he is represented by competent legal counsel. Enforcement of treaty obligations depends on reciprocal compliance by all member states to the Convention.

The European Union is concerned that if Mr. Leal is executed before receiving the remedy to which he is entitled under the Avena Judgment, an undisputed international obligation will be breached. Such a breach would undermine the international rule of law and could potentially impede the ability of consular officials around the world to carry out their duties.

Therefore, the European Union respectfully urges you to grant Mr. Leal a reprieve, thus allowing time for Congress or the Texas legislature to pass legislation implementing the ICJ's Avena Judgment.

Sincerely,

João Vale de Almeida
Ambassador

These materials are distributed by Brownstein Hyatt Farber Schreck LLP on behalf of the Embassy of Mexico.
Additional information is on file with the Department of Justice, Washington, D.C.

Embassy of Chile

Office of the Ambassador

Washington, DC. June 22, 2011

The Honorable Rick Perry
Office of the Governor
State Capitol
P.O. Box 12428
Austin, Texas 78711-2428

By Fax 512.463.1849

Ms. Rissie Owens, Presiding Officer
Texas Board of Pardons and Paroles
Executive Clemency Unit
Capital Section
P.O. Box 13401
Austin, Texas 78711

By Fax 512.463.8120

Re: Humberto Leal García

Dear Governor Perry and Presiding Officer Owens:

I am writing you regarding the case of Humberto Leal Garcia, a Mexican national who is facing execution in Texas on July 7, 2011. I urge you to grant Mr. Leal a reprieve based on humanitarian considerations and factors, as outlined below.

On March 31 2004, the International Court of Justice (ICJ) ruled in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) that the United States had breached the obligations concerning Mr. Leal's right to consular notification and access pursuant to Article 36 of the Vienna Convention on Consular Relations. The United States has recognized its international legal obligation to implement the remedies mandated by the ICJ in this judgment. However, in *Medellin v. Texas*, the United States Supreme Court held that Congress must pass legislation implementing the *Avena* judgment before it can be enforced by U.S. courts.

My Government is a party to the Vienna Convention on Consular Relations and the United Nations Charter. The Vienna Convention is crucial for the protection of all nationals who travel abroad. Enforcement of treaty obligations depends on reciprocal compliance by all member states to the Convention. Moreover, all member states to the Charter of the United Nations have agreed to comply with the decisions of the ICJ in any case to which they are a party (Article 94). Therefore, the United States has an international obligation to comply with the *Avena* Judgment.

My Government is concerned that Mr. Leal be executed before receiving the remedy which is entitled under the *Avena* Judgment and the United States is committed to

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Additional information is on file with the Department of Justice, Washington, D.C.

comply. Such a breach would undoubtedly undermine the international rule of law and would potentially impede the ability of consular officials around the world to carry out their duties.

For the foregoing reasons, my Government respectfully urges you to grant Mr. Leal a reprieve so that Congress or the Texas legislature may have sufficient time to pass legislation implementing the *Avena* Judgment.

Thank you for your consideration of this extremely serious matter.

Sincerely,

Arturo Fermandois
Ambassador of Chile

These materials are distributed by Brownstein Hyatt Farber Schreck LLP on behalf of the Embassy of Mexico.

EMBASSY OF EL SALVADOR
1400 16TH ST. N.W., SUITE 100
WASHINGTON, DC 20036

June 20th, 2011

The Honorable Rick Perry
Office of the Governor
State Capitol
P.O. Box 12428
Austin, Texas 78711-2428
By Fax 512.463.1849

Ms. Rissie Owens, Presiding Officer
Texas Board of Pardons and Paroles
Executive Clemency Unit
Capital Section
P.O. Box 13401
Austin, Texas 78711
By Fax 512.463.8120

Re: Humberto Leal García

Dear Governor Perry and Presiding Officer Owens:

I am writing you regarding the case of Humberto Leal García, a Mexican national who is facing execution in Texas on July 7th, 2011. I urge you to grant Mr. Leal a reprieve based on several factors, as outlined below.

On March 31, 2004, the International Court of Justice (ICJ) ruled in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) that the United States had violated Mr. Leal's right to consular notification and access pursuant to Article 36 of the Vienna Convention on Consular Relations. The United States has recognized its international legal obligation to implement the remedies mandated by the ICJ in this judgment. However, in *Medellin v. Texas*, the United States Supreme Court held that Congress must pass legislation implementing the *Avena* judgment before it can be enforced by U.S. courts.

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My Government is a party to the Vienna Convention on Consular Relations and the United Nations Charter. The Vienna Convention is crucial for the protection of all nationals who travel abroad. Enforcement of treaty obligations depends on reciprocal compliance by all member states to the Convention. Moreover, all member states to the Charter of the United Nations have agreed to comply with the decisions of the ICJ in any case to which they are a party (Article 94). Therefore, the United States has an international obligation to all member states of the Charter of the United Nations to comply with the *Avena* Judgment.

My Government is concerned that the United States will breach its undisputed international obligation if Mr. Leal is executed before receiving the remedy to which he is entitled under the *Avena* Judgment. Such a breach would undoubtedly undermine the international rule of law and would potentially impede the ability of consular officials around the world to carry out their duties.

For the foregoing reasons, my Government respectfully urges you to grant Mr. Leal a reprieve so that Congress or the Texas legislature may have sufficient time to pass legislation implementing the *Avena* Judgment.

Thank you for your consideration of this extremely serious matter.

Sincerely,

Francisco Altschul
Ambassador of El Salvador

These materials are distributed by Brownstein Hyatt Farber Schreck LLP on behalf of the Embassy of Mexico. Additional information is on file with the Department of Justice, Washington, D.C.

EMBAJADA DE HONDURAS

WASHINGTON, D.C.

THE AMBASSADOR

June 13, 2011

The Honorable Rick Perry
Office of the Governor
State Capitol
P.O. Box 12428
Austin, Texas 78711-2428

By Fax 512.463.1849

Ms. Rissie Owens, Presiding Officer
Texas Board of Pardons and Paroles
Executive Clemency Unit
Capital Section
P.O. Box 13401
Austin, Texas 78711

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Re: Humberto Leal García

Dear Governor Perry and Presiding Officer Owens:

I am writing you regarding the case of Humberto Leal García, a Mexican national who is facing execution in Texas on July 7, 2011, in order to request you to grant Mr. Leal a reprieve based on several factors, as outlined below.

On March 31 2004, the International Court of Justice (ICJ) ruled in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) that the United States had violated Mr. Leal's right to consular notification and access pursuant to Article 36 of the Vienna Convention on Consular Relations. The United States has recognized its international legal obligation to implement the remedies mandated by the ICJ in this judgment. However, in *Medellin v. Texas*, the United States Supreme Court held that Congress must pass legislation implementing the *Avena* judgment before it can be enforced by U.S. courts.

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